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No. 00-799

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Is a city's zoning ordinance, which prohibits the operation of more than one adult entertainment business at a single location, including an adult bookstore and an adult arcade, invalid because the city did not study the negative effects of that particular combination of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, initially filed July 27, 2000, and as amended August 28, 2000, (App.[1] 1-21) is reported at 222 F.3d 719 (9th Cir. 2000). The District Court's Order granting, *inter alia*, plaintiffs' motion for summary judgment (App. 22-56) is unreported.

JURISDICTION

The amended decision of the Court of Appeals was entered on August 28, 2000. App. 2. Petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc* was denied September 18, 2000. App. 59. The Petition for Writ of Certiorari was filed on November 17, 2000, and was granted on March 5, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Los Angeles City Ordinance Nos. 151294, 157538 and 158579 are reprinted in their entirety at App. 59-81.

The First Amendment to the Constitution of the United States provides in pertinent part that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

[1] Petition Appendix.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1983 of Title 42 of the United States Code provides in pertinent part that:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. The City Of Los Angeles Adult Entertainment Ordinance.

Following this Court's decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (*Young*), the Los Angeles City Council instructed the Planning Department to undertake a study "to determine whether and to what extent the concentration of . . . adult businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." App. 60. The City Council allocated $25,000 for the study and "all other projects

under study" were delayed for the three to four months the study would take to complete. JA[2] 170.

In June, 1977, the Planning Department completed a comprehensive study entitled "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles"[3] ("1977 Study"). The 1977 Study "encompassed all forms of 'adult entertainment.' " JA 58. The Police Department submitted a report[4] comparing the crime statistics for the Hollywood area to the crime statistics citywide for the years 1969-1975, where the number of adult businesses "proliferated from a mere 11 establishments to an astonishing number of 88 such locations." JA 177. The Hollywood area reported significant increases over the citywide average for crimes (JA 175 -176), arrests (JA 176) and deployment of police personnel. JA 176-177. These "overwhelming" increases "are all representative of the blighting results that the clustering of Adult Entertainment Establishments has on the entire community." JA 177.

General questionnaires were mailed to businessmen and residents in the studied areas and a second questionnaire was sent to real estate professionals. JA 99-111. Real estate appraisers indicated that the clusters of adult businesses "had a direct negative impact on property values." JA 91. Businessmen reported that concentrations of adult

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[2] Joint Appendix, consisting of two volumes: Volume I, pages 1-183 and Volume II, pages 184-306.

[3] Found at JA 35-162 (Volume I).

[4] The text and section one of that report is at JA 173-183 (Volume I). The 1977 Study excerpts and summarizes that report at JA 120-133.

businesses negatively impacted their patronage, their ability to recruit employees and lead to difficulty in renting office space or retaining desirable tenants. JA 104. "A high percentage of respondents report they do not feel safe in such areas." JA 105.

Two public hearings were held by the Planning Department, one in Hollywood and one in Northridge (in the San Fernando Valley).[5]

JA 92. "The most prevalent type of comment at the Hollywood meeting was an expression of fear walking in areas where 'adult entertainment' and related business [sic] are concentrated." JA 92.

The 1977 Study documented that the concentration of adult entertainment businesses results in increased crime, adversely impacted property values, and generally caused blight and other negative impacts in the neighborhoods where adult businesses concentrate. After making detailed findings supporting a dispersal type of ordinance modeled on the Detroit ordinance approved in *Young* (JA 42-46), the 1977 Study recommended that if an ordinance is adopted that there be a separation between adult businesses greater than 1000 feet and a separation from traditionally protected land uses such as places of religious worship, schools and parks of at least 500 feet. JA 41.

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[5] A summary of the Hollywood meeting is at JA 94-97. A summary of the Northridge meeting is at JA 97-98.

On July 18, 1978, the City Council enacted Ordinance No. 151294 adding § 12.70 to the Los Angeles Municipal Code.[6] App. 60-69.

That Ordinance added § 12.70 C to the Los Angeles Municipal Code which provided:

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[6] Pertinent to this lawsuit, that ordinance defined an adult arcade and adult bookstore:

> Section 12.70 B (1) defined an adult arcade:
>
> " 'Adult Arcade' – An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " App. 62
>
> Section 12.70 B (2) defined an adult bookstore:
>
> " 'Adult Bookstores' – An establishment which has as a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:
>
> "(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas;' or
>
> (b) Instruments, devices or paraphernalia which are designed for use in connection with 'specified sexual activities.' " App. 62.

These definitions have not been amended since their adoption and are not challenged here. Plaintiffs do not deny that they are operating both an adult bookstore and adult arcade at the same location within the meaning of the ordinance.

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." App. 67.

Section 12.70 D was added to the Code and provided, in pertinent part:

> "The distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business." App. 67.

In 1982, City officials discovered that the "measurement of distance" provision, subsection D, *supra*, was being interpreted "in such a manner as to permit a combination of such businesses to be located within the exterior structural walls of a single building at one site." JA 29. The intent in originally adding § 12.70 to the Municipal Code "was to provide for the dispersion of all adult entertainment business in the City," and thus "it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building." JA 29. A motion was introduced to amend § 12.70 in order to remove any ambiguity about the Council's intent to disperse all adult entertainment businesses. JA 28.

The staff report prepared by the Planning Department described the need for the ordinance as follows:

> "The intent of the City Council in enacting the existing adult entertainment zoning regulations in 1978 was to provide for the dispersion of *all* adult entertainment business in the City. *This being the case, it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building.* However, the . . . language [in § 12.70] relating to the measurement of distances . . . has resulted in an ambiguity with respect to the number of businesses which may be permitted within the 'exterior structural wall' of an establishment at one location. . . . Thus the need has arisen to enact the . . . subject proposed ordinance." JA 29, emphasis added.

Further, the report stated that "[e]nactment of the subject ordinance is necessary to clarify, on a permanent basis, existing provisions of the Adult Entertainment Zoning regulations contained in Section 12.70 of the Municipal Code. It is apparent that in enacting these regulations in 1978, the City Council did not intend to permit more than one adult business in the same building at one location." JA 31. At the time the City considered this matter, there was precedent supporting a regulation prohibiting two or more adult businesses at a single site, *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (*Hart*). *Hart* analyzed a North Carolina statute prohibiting two or more adult businesses at a location under this Court's *Young* decision, concluding that such a prohibition did not offend the First Amendment because it was a time, place and manner regulation. *Id.* at 826.

On March 16, 1983, the City Council adopted Ordinance No. 157538 (App. 70-76), amending § 12.70 to add

§ 12.70 B (17) to *expressly* prohibit more than one of the previously defined adult entertainment businesses at the same location and to make clear that "each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." App. 70-71. Section 12.70 C was also amended at that time to expressly prohibit more than one adult business in one building. App. 71. Ordinance 158579 (App. 77-81), enacted December 16, 1983, further clarified the legislative intent and resulted in the current version of the first paragraph of § 12.70 C,[7] which is the subject of this litigation. Subsection C provides:

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business." App. 77.

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[7] This provision of § 12.70 C has been referred throughout this litigation as either the "multi-use prohibition" or the "multiple use prohibition."

B. The Two Plaintiffs.

After the adoption of the code amendment specifically prohibiting two adult businesses at a single location, Alameda Books commenced operation as an adult video arcade in 1987 and closed in 1990. JA 20. It reopened in 1993 at a different site within the same shopping center as an adult video arcade and adult bookstore. JA 21. The adult video arcade has 15 video machines, each located in a separate booth. JA 227. Alameda Books admits that it has "been openly operating in violation of this provision since approximately November of 1993." JA 22.

Highland Books began operation as an adult video arcade in 1987 and commencing in June, 1991, it also began operating as an adult bookstore at the same location. JA 20. The adult video arcade has 19 video machines, each located in a separate booth. JA 227. Highland Books admits that it "has been openly operating in non-compliance with this 'multiple-use prohibition' since June, 1991."[8] JA 22.

C. The Proceedings Below.

Plaintiffs filed their Complaint for Declaratory Relief and Injunctive Relief Under 42 U.S.C. § 1983 on November 15, 1995. The First Cause of Action was for "Declaratory And Injunctive Relief Under 42 U.S.C. § 1983 To Prevent Threatened Enforcement Of Portions Of L.A.M.C.

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[8] Further, the plaintiffs waived any argument that an adult arcade cannot economically operate independent of an adult bookstore. JA 250-252, 274.

§ 12.70 Prohibiting Two Or More Adult Entertainment Businesses In Same Building." The City filed its answer on March 8, 1996. The parties filed cross-motions for summary judgment or summary adjudication of the issues which were argued on October 20, 1997. JA 253-254. In an Order filed January 11, 1998, the district court denying, *inter alia*, plaintiffs' motions for summary judgment and denying in part and granting in part the City's motion for summary adjudication. JA 253-306. The court considered two issues as surviving summary judgment. First was whether the adult bookstore and adult arcade were "separate adult uses such that their 'concentration' in a single building can be expected to cause the harmful secondary effects identified in the 1977 study." JA 305. Also set for trial was whether the City's ordinance left open reasonable alternative sites for adult entertainment uses. JA 306.

Plaintiffs filed motions to reconsider the First Amendment portion of the district court's Order of January 12, 1998. App. 22-23. The Court heard oral argument on April 13, 1998 (App. 23), and on May 28, 1998, issued a new order granting the motion for reconsideration of the First Amendment portion of the previous order. App. 22. The new order vacated the prior order denying summary judgment (App. 54) and granted plaintiffs' motion for summary adjudication of the First Cause of Action. App. 55. The court concluded that the City's prohibition on two or more adult businesses in the same building was not a content neutral secondary effects regulation and was therefore an invalid prior restraint. App. 54. The new order rendered moot the remaining causes of action in the complaint (App. 54) including whether the disputed City

prohibition allowed "for reasonable alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (*Renton*).

Judgment was entered for the plaintiffs, and an injunction against the enforcement of § 12.70 C was granted. App. 57-58.

The Court of Appeals for the Ninth Circuit affirmed. App. 3. Although the court conceded that the City had a substantial government interest in reducing crime in its neighborhoods, it held that the City failed to prove that the prohibition against more than one adult business at a single location served that interest. App. 11-12. The court determined that the 1977 Study was insufficient to show that an adult arcade and adult bookstore at a single location contributed to the negative secondary effects caused by the concentration of such businesses identified in the 1977 Study. *Id.* The court therefore concluded that it was unreasonable for the City to conclude that an adult bookstore and an adult video arcade at a single location would have harmful secondary effects. App. 15.

SUMMARY OF THE ARGUMENT

This case involves the evidentiary standard necessary to support a municipal zoning ordinance regulating the spacing of adult entertainment businesses. This is not "the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinance" as was *Young*. 427 U.S. at 76

(Powell, J., concurring). It is, however, otherwise indistinguishable from that seminal decision. Moreover, the Ninth Circuit's decision directly conflicts with this Court's decision in *Renton* which, in reaffirming *Young*, rejected a rigid evidentiary standard of proof in favor of evidence which the municipality "reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. Further, *Renton* did not require a city to prove that a specific business or a combination of businesses caused harmful secondary effects, as did the court of appeals, only that the "category" of adult businesses "produce the unwanted secondary effects." 475 U.S. at 52.

The often stated doctrine of this Court is that each forum of expression under the First Amendment is *sui generis* and properly analyzed by the case law applicable to that forum:

> "This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. (Citations omitted.) Even a cursory reading of these opinions reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949): Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500-501 (1981) footnote omitted. *Accord, Renton*, 475 U.S. at 49, quoting *Young*, 427 U.S. at 82 (Powell, J, concurring).

This case is concerned with the law of zoning, governed by the principles first enunciated in *Young* and subsequently affirmed in *Renton*. In *Young*, this Court "held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments." *Renton*, 475 U.S. at 46.

Justice Powell in his concurrence in *Young* not only recognized that "zoning has become an accepted necessity in our increasingly urbanized society," but also that "zoning restrictions have taken on forms far more complex and innovative" than when zoning ordinances were first upheld by this Court in the 1920's. *Young*, 427 U.S. at 74 (Powell, J., concurring). Justice Powell concluded "that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" 427 U.S. at 80, quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

In *Renton*, this Court built on the *Young* framework and held that a city was not required to make particularized findings regarding the secondary effects of adult businesses within the city itself, but rather could rely on the experiences of other cities. 457 U.S. at 51. The evidence a city relies upon need only be "reasonably believed to be relevant to the problem the city addresses." *Id.* at 51-52. Under this deferential evidentiary standard, a city is permitted "a reasonable

opportunity to experiment with solutions to admittedly serious problems." *Id.* at 52, quoting *Young*, 427 U.S. at 71.

Thus, both *Young* and *Renton* stand for the proposition that municipalities have broad authority, consistent with the First Amendment, to regulate the location of adult entertainment businesses through municipal zoning ordinances. Under this Court's precedent applicable to the regulation of adult businesses through the zoning power, all that need be shown here to uphold the constitutionality of the City's regulation are: (1) that the City's regulation does not ban adult businesses, and therefore can be considered "as a form of time, place and manner regulation" (*Renton*, 475 U.S. at 46); (2) that the regulation is content neutral, that is, it is not aimed at the content of the material but rather addresses the secondary effects those businesses have on the surrounding community (*id.* at 47); and (3) that ordinance is designed to serve a substantial governmental interest.[9] *Id.* at 50. The Ninth Circuit, however, stumbled over the proper application of these three factors and in doing so misinterpreted this Court's First Amendment intermediate scrutiny jurisprudence.

The Ninth Circuit required the City to prove based on empirical evidence that a combination of adult businesses in one building actually contributes to the harmful secondary effects caused by the concentration of adult

[9] The fourth *Renton* factor, whether the regulation "allows for reasonable alternative avenues of communication" (at 475 U.S. 50) is not before the Court. Petition, App. 54-55.

businesses that were identified in the City's 1977 Study. App. 15. The City relied on its earlier study and *Hart*, *supra*. However, because the City's 1977 Study did not *specifically* consider the impact of more than one adult business in one building, there was, according to the lower courts, no evidence to support the regulation when it was enacted by the City Council. The City was required to prove "the impact of individual adult entertainment business units" in a single building, whereas the 1977 Study only showed "the impact of a concentration of such business units in small geographic areas." App. 12. This reasoning, however, is inherently contradictory and circular, since a concentration of adult businesses *in one building* is a concentration of adult businesses units *in a small geographic area*.

Moreover, both lower courts (App. 19-21 and App. 45-47) did not address this Court's approval of the City of Renton's reliance on the findings contained in a decision of the Supreme Court of Washington which formed the evidentiary basis for Renton's zoning ordinance, which this Court concluded was reasonable. 475 U.S. 50-51. It is therefore difficult to conclude, as did the Ninth Circuit, that Los Angeles' reliance on *Hart* is unreasonable under the First Amendment. App. 21.

This Court has decided that local governments may enact zoning regulations of adult businesses without subjecting the regulation to the strict scrutiny standard of First Amendment review. In the zoning context, the intermediate standard of First Amendment review is one of reasonableness, deferring to legislative judgments on how to remedy the identified problems. It is, therefore, no surprise that this Court has consistently relied on its

decision in *Renton* for the proposition that courts should defer to legislative fact finding in many areas of great constitutional importance. See, e.g., *Nixon v. Shrink Missouri Government Pac.*, 528 U.S. 377, 393 (2000) (state limits on contributions to political campaigns); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (limitations on attorney advertising). The same standard applies here.

A second flaw in the court of appeals' decision was its rather cavalier dismissal of the City's reliance on *Hart, supra*. App. 20. Both the district court (App. 45) and the court of appeals (App. 19) agreed that the regulation in *Hart* prohibiting two or more adult businesses in the same building was identical to the City's regulation challenged in this case. Both courts dismissed *Hart* because it was decided before *Renton* and was contrary to Ninth Circuit precedent. App. 19 and 45. Both lower courts studiously ignored the fact that *Hart* was decided after *Young* and that its analysis upholding the North Carolina regulation at issue there "parallels and draws from the *Mini Theatres* analysis." *Hart*, 612 F.2d at 824. Even a cursory analysis of *Hart* shows that, although it pre-dated *Renton*, it is fully consistent with *Renton*. *Hart's* reasoning is persuasive and any Ninth Circuit precedent to the contrary, real or imagined, is suspect, not *Hart*.

This Court's precedent establishes a deferential evidentiary burden on a city to justify a zoning ordinance regulating the location of adult businesses. That evidentiary burden does not require evidence independent of that which already exists, and it is entirely appropriate to rely on the experiences of other cities as detailed in their studies or through case law relating those experiences to meet that burden. Because the court of appeals did not

apply the correct standard of proof contained in this Court's precedent, the answer to the question presented is obvious, the City's zoning regulation prohibiting more than one adult business is not invalid because of any evidentiary failure, and the Court should reverse the judgment of the Ninth Circuit.

ARGUMENT

A. The Evidentiary Burden Imposed On The City By The Court Of Appeals To Justify Its Prohibition Of More Than One Adult Business At A Single Location Is Contrary To *Renton*.

1. The Court Of Appeals Imposed A Greater Evidentiary Burden On The City Than Required By *Renton*.

There are two aspects to the burden of proof necessary to justify a zoning regulation under *Renton* and *Young*. The first is the amount or quantum of evidence necessary to show that adult businesses result in undesirable secondary effects. The second is the amount of deference the courts should give to local governments in designing regulations to combat those secondary effects. The court of appeals required specific findings relating the particularized contribution of the businesses sought to be regulated, a significant evidentiary burden. App. 12-13. Given this rigid evidentiary standard, that court gave little deference to the City's legislative judgment.

That evidentiary burden, imposed by the Ninth Circuit in this case in 2000, is the same "unnecessarily rigid burden of proof" which that court imposed in its 1984

decision, *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984). There were no adult movie theaters in the City of Renton when that ordinance was enacted. 475 U.S. at 44. The Ninth Circuit in 1984 required a specific showing of harm by Renton (748 F.2d at 537), which obviously could not be made if there were no adult businesses in that city. That standard was specifically rejected by this Court in *Renton*. 475 U.S. at 50. Rather, this Court established a far more reasonable standard for legislative fact finding and judgments in adopting zoning regulations regulating adult businesses when it required only evidence that was "reasonably believed to be relevant." 475 U.S. at 51.

The proper evidentiary burden that should be placed on a city to justify its zoning regulations was set forth in *Renton*: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52. This burden precludes the particularized showing required by the court of appeals in this case. Moreover, this deferential standard includes the ability of the municipality to provide post-enactment justification for its ordinance. 475 U.S. 45 ("While the federal action was pending, the City Council amended the ordinance . . . adding a statement of reasons for its enactment. . . . ").

Having evidence before it of "Seattle's identification of the secondary effects" as well as "the relevance of Seattle's experience to Renton" this Court could find "no constitutional defect in the method chosen by Renton to

further its substantial interests." 475 U.S. at 52. This Court then deferred to the Renton City Council's regulatory determinations:

> " 'It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . [T]he city must be allowed reasonable opportunity to experiment with solutions to admittedly serious problems.' " 475 U.S. at 52, quoting *Young*, 427 U.S. at 71 (plurality opinion).

2. This Court Has Not Abandoned The *Renton* Standard.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court rejected a challenge to a regulation prohibiting the rental of a room at an adult motel for fewer than 10 hours. *Id.* at 236. This Court found Dallas' reliance on the Los Angeles 1977 Study, which "considered cursorily the effect of adult motels on surrounding neighborhoods," plus the legislative judgment that short-time rentals fostered prostitution and criminal activity which the Dallas ordinance sought to suppress, to be "adequate." *Id.* Indeed, that legislative judgment was held to be reasonable on minimal evidence. *Id.* The court of appeals in that case, *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), dismissed the need for Dallas to make specific findings that adult motels "engendered the same effects on property values and crime as do other sexually oriented businesses" because the "City's interest [was] self-evident and substantial." 837 F.2d at 1304. This Court agreed. As with Dallas, Los Angeles' interest is self-evident and substantial. Any requirement that specific

findings must be made to justify the City's zoning regulation is disproved by *FW/PBS*.

3. This Court Has Imposed The Same Deferential Evidentiary Standard In Other First Amendment contexts.

In *Metromedia, Inc., supra,* this Court considered a challenge to the City of San Diego's ordinance regulating billboards and upheld the legislative determination that billboards constituted traffic hazards and denigrated San Diego's aesthetic interests, 453 U.S. at 509-510, stating:

> "We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." *Id.* at 509 (plurality opinion).[10]

Further, the plurality opinion went on to state that:

> "We reach a similar result with respect to the second asserted justification for the ordinance – advancement of the City's esthetic interests. It is not speculative to recognize that billboards by their very nature wherever located

[10] Although this and the following quote are from the plurality opinion, seven Justices agreed with the legislative judgment that billboards contribute to the traffic hazards and visual blight which justified the total ban of off site billboards. *See, id.*, at 549-553 (Stevens, J., dissenting in part); *id.* at 560-561 (Burger, C.J., dissenting); and *id.* at 570 (Rehnquist, J, dissenting).

> and however constructed, can be perceived as an 'esthetic harm.' " *Id.* at 510.

Here, Los Angeles undertook a well-regarded study that established a causal connection between adult businesses and significant adverse secondary effects. If, under this Court's precedent, legislative judgments can be properly based on the "accumulated, common-sense judgments of local lawmakers and of the many reviewing courts," then certainly the legislative judgment should be sustained where, as here, that judgment is based on the City's own study. That was the lesson of *Young* and *Renton* ignored by the court of appeals.

In *Nixon v. Shrink Missouri Government Pac., supra,* this Court relied on *Renton* for the proposition that Missouri was not required to produce new studies or evidence independent of that already in existence when it upheld a Missouri statute limiting campaign contributions to state political candidates. The respondents argued to this Court that there must be "empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence" in order to justify Missouri's regulations. 528 U.S. at 390-391. This Court specifically rejected that argument (*id.* at 391-392), even though the standard of review was "heightened judicial scrutiny" (*id.* at 391), not the intermediate scrutiny "standard applicable to merely time, place, and manner restrictions." *Id.* at 386.

The record in that case did "not show that the Missouri Legislature relied on the evidence and findings

accepted in *Buckley*."[11] 528 U.S. at 393. This Court permitted Missouri to rely on a post-enactment affidavit from a state senator setting forth the reasons for the statute, and the district court cited to newspaper articles and editorials describing the corrupting influence of large campaign contributions in order to defend the legislative judgement at trial. *Id.* This Court determined that the record was sufficient to show that the same "congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law." *Id.* The Court only required that whatever evidence was introduced in support of the Missouri statute "was reasonably believed to be relevant to the problem [Missouri] addresses." *Id.* at 394 fn. 6, quoting *Renton*, 475 U.S. at 51-52.

It is fair to say that the evidence to support the City's zoning regulation in this case is far 'greater' than the evidence proffered by Missouri in *Nixon v. Shrink*, a case where the standard of review was "heightened judicial scrutiny." *Id.* at 391. There is more than just "some" evidence here that prohibiting more than one adult business at a location serves a substantial governmental interest. To require more, as did the Ninth Circuit, gives owners and operators of adult businesses greater protection under the First Amendment than campaign contributors. The standard of review imposed by the court of appeals is incompatible with the evidentiary standard set by this Court with respect to zoning regulations for adult businesses because "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political

[11] Referring to *Buckley v. Valeo*, 424 U.S. 1 (1976).

debate that inspired Voltaire's immortal comment."[12] *Young*, 427 U.S. 70 (plurality opinion).

Similarly, in *Florida Bar v. Went For It, Inc., supra*, this Court upheld regulations of the Florida Bar which "prohibit[ed] personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives for 30 days following an accident or disaster." 515 U.S. at 620. The purpose of these rules was "to curb[ing] activities that 'negatively affec[t] the administration of justice' " (*id.* at 624) and followed a two year study "of the effects of lawyer advertising on public opinion." *Id.* at 620. The Court characterized the Bar's interest in preserving the integrity of the legal profession as "substantial." *Id.* at 625.

The Florida Bar submitted a 106 page summary of its two-year study to the district court that contained statistical and anecdotal evidence to support its position that "the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Id.* at 626. This Court commented that "[t]he anecdotal record mustered by the Bar is noteworthy for its breadth and detail" (*id.* at 627) and included newspaper editorials and excerpts from numerous complaints about this practice. *Id.* at 627-628. Relying in part on *Renton*, this Court found that showing sufficient to support the regulations, stating:

> "Indeed, in other First Amendment contexts we have permitted litigants to justify speech

[12] "I disapprove of what you say, but I will defend to the death your right to say it." 427 U.S. at 63.

> restrictions by reference to studies and anecdotes pertaining to different locales altogether, (citations omitted), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.' " *Id.* at 628, citation omitted.

The Florida Bar regulation was found valid because the record showed that it "target[ed] a concrete, nonspeculative harm." *Id.* at 629. Similarly here, the record shows that the City's zoning regulation prohibiting more than one adult business at a single location equally targets a concrete, nonspeculative harm: that the concentration of adult businesses in small geographic areas cause adverse secondary effects. Under the rationale of *Young*, *Renton*, and this case, the Los Angeles zoning regulation prohibiting more than one adult business at a location passes First Amendment intermediate scrutiny analysis.

Also illustrative of this Court's intermediate scrutiny jurisprudence is the interplay between this Court's decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*) which concerned the constitutionality of the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992,[13] an area in which "society's interest" is of a far greater "magnitude" than "erotic materials that have some arguably artistic value." *Young*, 427 U.S. at 70 (plurality opinion).

In *Turner I*, after undertaking an analysis of the Cable Act and the evidence before the district court, the Court

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[13] 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(a) and 535(a).

remanded the case "to develop a more thorough factual record" before "passing upon the constitutional validity of the challenged provisions." 512 U.S. at 668 (plurality opinion).[14] The plurality desired "a more substantial elaboration . . . of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence [on the financial difficulty of stations dropped by the cable operators]." *Id.* at 667.

However, in remanding, the plurality stated that "courts must accord substantial deference to the predictive judgments of Congress" because it "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Id.* at 665-666, internal quotes and citation omitted. These predictive judgments were, of course, subject to the independent judgment of the courts, but in doing so:

> "This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. See *Century Communications Corp. v. FCC* 835 F.2d 292, 304 (CADC 1987) ('[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce

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[14] Justice Stevens concurred in the judgment, although he was of the view the judgment of the district court should be affirmed. 512 U.S. 675.

either empirical support or at least sound reasoning on behalf of its measure.')."[15] 512 U.S. at 666.

On remand, the district court considered additional evidence, which included industry documents obtained after remand, expert testimony and "studies and anecdotal evidence." *Turner II*, 520 U.S. at 187. This Court again confirmed that "courts must accord substantial deference to the predictive judgments of Congress" (520 U.S. at 195, quoting *Turner I*, 512 U.S. at 665), recognizing that factual support for the legislative judgment or prediction is often not possible or even required, but involves deductions based upon expert knowledge. 520 U.S. at 196.

The ultimate question then is not whether the legislative decision is objectively correct, but "whether the legislative conclusion was reasonable and supported by substantial evidence." *Id.* at 211. Therefore, it is not relevant that the evidence is in conflict since it is entirely possible to draw inconsistent conclusions from the same evidence. *Id.*

Lastly, these cases also reject the notion of the court of appeals that the only evidence available to the City to justify its regulation is the evidence before the legislative body at the time the regulation was adopted. App. 11-14. Clearly, this Court's precedent permits the introduction of post-enactment evidence at trial to support the constitutionality of a regulation challenged under the First

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[15] Justice Stevens in his concurrence agreed with this formulation. 512 U.S. 670 fn. 1.

Amendment. That evidence can include anecdotal and historical evidence, case law or other studies.

4. The Los Angeles Zoning Ordinance Challenged Here Meets The Evidentiary Burden Imposed By *Renton*.

The record before the Los Angeles City Council in 1978, and again in 1983 when the ordinance was amended, to explicitly prohibit two adult businesses at one location, was substantial. Although Los Angeles based its ordinance on Detroit's ordinance approved by this Court in *Young*, it was not a slavish imitation. The 1977 Study recommended that the ordinance "be designed for specific application in the City of Los Angeles." JA 41. So, unlike Detroit, which included adult movie theaters in its Anti-Skid Row ordinance along with pawn shops, taxi dance halls, pool rooms and shoe shine parlors, *Young*, 427 U.S. at 53 fn 3, Los Angeles required the dispersal of eight defined adult businesses from each other and distanced from traditionally protected sensitive land uses. App. 67. What each city had in common was the primary purpose of its ordinance: "preventing a concentration of these uses in any one area (i.e., not more than two such uses within one thousand feet of each other which would create such adverse effects.)" 427 U.S. at 55 fn 6, quoting the Detroit ordinance. When it became apparent that there was ambiguity in the meaning of the ordinance, the City Council closed the loophole. Had someone in Detroit developed a theory to permit multiple restricted uses in one building, Detroit officials may well have acted in the same manner as those in Los Angeles to remove any ambiguity. The 1983 amendment is clearly

consistent with, and logically related to, the original intent of the City Council that all adult businesses must be separated from each other. Indeed, this Court recognized that it was reasonable to assume that the City of Renton would amend its ordinance to include other adult businesses in addition to adult movie theaters should the need arise. *Renton*, 475 U.S. at 53-54.

The record before the district court demonstrated that the City's adult businesses ordinance was consistent with existing City zoning practices. Historically, Los Angeles has regulated arcades, which are places of amusement, separately from bookstores and other retail establishments because arcades have greater land use impacts. JA 186. Concerned about the increased negative effects associated with concentrating a "number of businesses at one site," the City's zoning regulations impose "special regulations for 'mini-malls.' " JA 187. The City has required the dispersal of fast food establishments in certain areas of the City to mitigate the impacts associated with their proliferation, as well as imposing minimum distance separation between off-site billboards. JA 188. The City made a zoning decision to disperse all adult businesses and incorporated those regulations into the fabric of the City's zoning provisions, much in the same way that Detroit's regulation of adult movie theaters fit into the fabric of that city's Anti-Skid Row ordinance.

Moreover, the 1977 Study confirms what has been shown by history and case law, that left unregulated arcades and adult arcade/bookstore combinations cause significant negative effects. *Renton* would permit the City's regulation on this basis alone, independent of the City's 1977 Study.

Adult video arcades have long been recognized as independent targets of regulation because their "patrons are not expected to enter with the solemnity of a business visitor at a mercantile establishment." *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982), quoting *EWAP, Inc. v. City of Los Angeles*, 97 Cal.App.3d 179, 189-190, 158 Cal.Rptr. 579, 585 (1979), quoting *People v. Perrine*, 47 Cal.App.3d 252, 258, 120 Cal.Rptr. 640, 643-644 (1975). Evidence was introduced at trial showing the long history of problems associated with arcades (JA 189-222), including a picture of an Edison Phonograph and Kinetoscope Parlor in Los Angeles dated 1896. JA 195. Early on, there were complaints concerning the safety, hygiene and lighting of these establishments. JA 200. Equally early on, the more risque' "videos" for those times were the more popular offerings. JA 207. "Their first patrons were often tramps and drunks. The respectable shuttered away from them and murmured against them. It began to be said that something ought to be done about policing them or maybe banning them altogether." JA 209.

Adult bookstore/video arcade combinations are also the subject of litigation because of their ability to become public nuisances. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). The City of Los Angeles has its own very real history with the tendency of these combination businesses to create negative secondary impacts on neighboring properties. *E.W.A.P., Inc. v. City of Los Angeles*, 56 Cal.App.4th 310, 65 Cal.Rptr.2d 325 (1997) (adult bookstore/arcade which opened in 1972 was a source of nuisance abatement actions activities since at least 1987,

subject to City's nuisance abatement ordinance notwithstanding plaintiff's connection to the First Amendment.).

There is no requirement under *Young* and *Renton* that local officials stand by and wait until adult businesses become public nuisances before a City can regulate the undesirable impacts associated with those businesses. There was empirical evidence in the record before the City Council that concentrations of adult businesses cause unwanted secondary effects, and that those negative impacts can be ameliorated by the application of sound planning and zoning principles.

The case law, federal and state, is an instructive history of the deleterious impacts adult businesses have in the real world. The Los Angeles City Council, before and after 1978, was well versed in the problems caused by the concentration of adult businesses, and it was reasonable for it to conclude that restricting one adult business to a location responds to the needs of the City and is logically related to the legislative ends desired by the City Council.

This Court has authorized cities to regulate adult businesses through their zoning ordinance. The City is free to disperse them as in *Young*, or concentrate them as in *Renton*. Los Angeles has, based upon substantial evidence, adopted a method of dispersing adult businesses which meets the specific needs of Los Angeles. As in *Renton*, this Court should "find no constitutional defect in the method chosen by [Los Angeles] to further its substantial interests." 475 U.S. at 52. It is not the function of the courts "to appraise the wisdom of [the city's] decision," but rather to allow cities "a reasonable opportunity

to experiment with solutions to admittedly serious problems." *Id.*, quoting *Young*, 427 U.S. at 71 (plurality opinion), internal quotes omitted. The Ninth Circuit did not agree with the wisdom of the City's regulation and denied Los Angeles a reasonable opportunity to experiment based upon its own needs. In doing so, it forgot what it had said in another context: that courts should "leave the fine-tuning of the distance requirement to the legislative body." *Colacurcio v. City of Kent*, 163 F.3d 545, 554 (9th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) (upholding a ten foot separation between patrons and exotic dancers at an adult nightclub).

B. The Rationale And Result In *Hart Book Stores, Inc. v. Edmisten* Is Fully Consistent With This Court's Precedent And Reflects The Analysis That Should Have Been Undertaken By The Court Of Appeals In This Case.

Without analysis or much comment, the court of appeals, as did the District Court, dismissed out of hand the City's reliance on *Hart, supra*, because the case was decided before *Renton* and was inconsistent with Ninth Circuit precedent. App. 20. The City's Petition fully discusses how *Hart* predicts, and is consistent with, this Court's reasoning and decision in *Renton* in almost all respects (Petition at 19-21) and need not be repeated here. *Hart*, however, is more supportive of the City's regulation than just being prescient.

The Ninth Circuit dismissed *Hart* because of its lack of a formal legislative history to support the North Carolina statute prohibiting more than one adult business at

the same location. App. 20. Equally upsetting to the court below was the seeming deference given by the *Hart* court to the legislative judgment, which held that the North Carolina regulation could not be considered "unreasonable." Simply put, if a court of appeals could think a legislative judgment reasonable on a minimal legislative record, how can it be any less reasonable with an extensive legislative history before the legislative body which supports the same conclusion? It was, after all, a portion of the Los Angeles legislative history, the 1977 Study, which led to the conclusion that the North Carolina statute was reasonable. *Hart*, 612 F.2d at 829 n. 10.

Hart is also consistent with this Court's deferential approach to legislative judgments in this context by permitting the courts to rely on post enactment evidence. The district court in striking the North Carolina statute gave little weight to the only evidence before the legislature, a declaration from the Director of the Wake County Department of Public Health describing the conduct of the patrons "in businesses like plaintiffs." *Hart Book Stores, Inc. v. Edmisten*, 450 F.Supp 904, 907 (E.D.N.C. 1978). In reversing, the court of appeals stated that "[w]hile there is no formal legislative history of the law, the record does show that the sponsor of the legislation was concerned to bring these secondary effects to the legislature's attention." *Hart*, 612 F.2d at 828. After quoting from the report presented to the Legislature to show what those secondary effects were (*id.* at 828-829 fn 9), the court concluded that the "dispersal of the marketing activities might ameliorate these secondary effects to some extent, thereby furthering the state's interest, cannot be thought unreasonable." *Id.* at 829. The court, in

footnote 10 (*id.*), found similar location restrictions "justified . . . to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay," citing to court decisions, including *Young*, and the 1977 Study.

This Court in *Renton* recognized that the City of Renton could rely on the factual findings set forth by the Washington Supreme Court as support for its ordinance. 475 U.S. The factual findings contained in a decision of a district court have been held to be legally sufficient. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 830-831 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000). In addition to *Hart*, there is the substantial body of case law showing how individually and in combination, adult bookstores and arcades, are a constant source of negative secondary impacts which require a substantial allocation of governmental resources to ameliorate. *Arcara, supra*; *Ellwest Stereo Theatres, supra*; *E.W.A.P., Inc. v. City of Los Angeles, supra*. This long judicial history alone should be sufficient under *Renton* to support the conclusion that more than one adult business at a single site is not in the public interest because such a combination generates negative secondary effects leading to blight and decay. How much more compelling then is the substantial governmental interest when, as here, the City undertook to document the actual adverse secondary impacts of the concentration of adult businesses in small geographical areas within its boundaries.

In sum, the City reasonably and properly relied on *Hart* to support its already factual based legislative judgment. That judgment is supported by substantial evidence that all adult businesses must be disbursed in

order to control the negative secondary effects of such businesses. If there is a reasonable basis to conclude that adult businesses must be disbursed in order to effectuate the substantial governmental interest identified by the City (JA 49), then it must also be reasonable to conclude that two adult businesses at the same location is contrary to that same governmental interest.

C. The City's Prohibition Of More Than One Adult Business At A Single Location Meets All Of The Requirements Of *Renton*.

Even a cursory review of the City's zoning ordinance establishes that it easily survives First Amendment scrutiny based on the three *Renton* factors at issue here. Even though the court of appeals dismissed as "needlessly establishe(d)" *Renton's* first inquiry (App. 9), it reluctantly conceded that since the City's ordinance did "not ban adult entertainment establishments altogether" and that it is a time, place and manner regulation. App. 10. There is also no real dispute as to whether the City's ordinance is "content neutral."[16] The court of appeals stated that it "need not decide whether the contested regulation is content-neutral." App. 10. In any event, this Court has held that "with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of

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[16] As this Court said in another First Amendment context, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Renton*, 475 U.S. at 49. The City's adult zoning regulations were enacted to "ameliorate the undesirable secondary effects of such businesses" (App. 60-61) and are, therefore, content-neutral regulations.

Moreover, this Court's decisions in *Young* and *Renton* establish that there is a substantial governmental interest in protecting the quality of urban life by minimizing the secondary effects of adult businesses. There is no dispute that the City's ordinance was designed to accomplish that goal. The zoning regulation at issue here is an integral part of a comprehensive zoning ordinance designed to do so by geographically separating adult businesses from each other as well as from historically protected sensitive land uses.

If adult businesses need to be separated from each other, they certainly cannot be located in the same building. The City does not ban adult arcades or adult bookstores. However, the City does not allow them to be located in the same place. The same is true for any and all combinations of adult businesses at one location, since the ordinance does not prohibit just an adult bookstore/video arcade combination, but all combinations of such businesses. The ordinance says that "[n]o person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof. . . . " App. 77.

The district court concluded that "[t]he 1977 Studies on which the City relies to prove a substantial government interest demonstrate the need for a distance

requirement for separate adult businesses." App. 47. That conclusion should have ended this inquiry in the lower courts, leaving open only the issue of whether the City's ordinance allowed for alternative avenues of communication.

D. There Is No Reason To Reformulate This Court's Test In *Renton* For Determining When Adult Businesses Result In Secondary Land Use Impacts.

In *Renton, supra,* this Court established four factors to consider in analyzing the constitutionality of zoning ordinances regulating adult entertainment businesses. First, if the ordinance does not ban adult businesses, it must be considered a "time, place and manner regulation." 475 U.S. at 46. Second, the court must determine whether the challenged regulation is "content neutral." *Id.* at 47. An ordinance is content neutral if it is "designed to combat the undesirable secondary effects" of adult businesses. *Id.* at 49. If so, it is "reviewed under the standards applicable to 'content-neutral' time, place and manner regulations." *Id.* Third, the government needs to show that the "ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.* at 50. The fourth *Renton* factor, whether the City's regulation provides for reasonable alternative avenues of communications (*id.*) is not before the Court.

Not content with this Court's straightforward *Renton* test, the court of appeals saw fit to reformulate "this test in a slightly different and (we believe) more coherent

manner."[17] App. 7. The court of appeals' reformulation of the *Renton* test fails to follow *stare decisis* and therefore, requires special justification, *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989), but does not provide any justification for doing so. Where, as here, "a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997), citation and internal quotes omitted.[18]

This Court's *Renton* test is in no need of reformulation. It is a straightforward test which has been consistently applied without difficulty by other courts. See, e.g.,

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[17] In doing so, the court of appeals relies on *Colacurcio v. City of Kent, supra. Colacurcio*, however, contains no basis for concluding that the *Renton* test was somehow in need of any reformulation. The ordinance challenged in *Colacurcio* required a ten foot separation between a patron of an adult nightclub and the nude exotic dancer. 163 F.3d at 549. The First Amendment context was not zoning, as here, but expressive conduct and the *Colacurcio* court was primarily concerned with the level of constitutional protection to be given to nude table dancing in light of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). *Id.* The *Colacurcio* court ultimately upheld the challenged ten foot separation requirement. *Id.* at 557. In doing so, the court cited to *Renton, Young* and other decisions of this Court to support its legal conclusions. Its analysis cannot be interpreted as establishing a new formulation of this Court's *Renton* test.

[18] This has also been the prevailing view of the Ninth Circuit. See, e.g., *Ackerley Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095, 1096 (9th Cir. 1997) ("However, it is not for us to overrule Supreme Court authority that is squarely on point.")

Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123 (3rd Cir. 1993); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994); *Z.J. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000);[19] as well as *Buzzetti v. City of New York*, 140 F.3d 134 (2nd Cir. 1998), *cert. denied*, 525 U.S. 924 (1998) and *City of National City v. Wiener*, 3 Cal.4th 852, 12 Cal.Rptr.2d 701, 838 P.2d 223 (1992), *cert. denied*, 510 U.S. 824 (1993).

CONCLUSION

The City zoning ordinance challenged here prohibits more than one adult business at the same location. In adopting this clarification of the City's general rule that adult businesses be separated from one another in order to avoid their proven secondary land use impacts, the City relied on its 1977 Study, a report this Court relied on to validate an adult business regulation of another city. In addition, the specific regulation challenged here was upheld by the Fourth Circuit in *Hart, supra*. The evidence relied on by the City meets the *Renton* standard of proof for zoning ordinances regulating adult businesses. Because the court of appeals did not properly apply that standard of proof and did not give proper deference to the City's legislative judgment as required by this Court's

[19] These first four cases are discussed in the City's Petition, pages 12-18.

precedent, this Court should reverse the judgment of the court of appeals.

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